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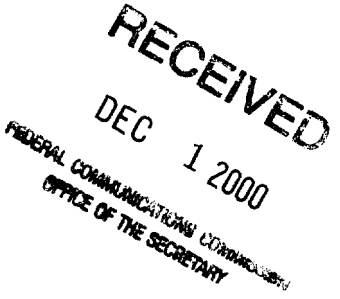
December 1, 2000

VIA HAND DELIVERY



Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
445 12th Street, SW
Room TW-B204
Washington, DC 20554

Re: GN Docket No. 00-185, *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*

Dear Ms. Salas:

Enclosed for filing are one original and four copies of the Comments of SBC Communications Inc. and BellSouth Corporation in the above-captioned matter. Copies have been provided to persons specified in the Commission's Notice of Inquiry of September 28, 2000.

Yours truly,

Colin S. Stretch

Enclosures

No. of Copies rec'd 0+4
List A B C D E

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FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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COMMENTS OF SBC COMMUNICATIONS INC. AND BELLSOUTH CORPORATION

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December 1, 2000

EXECUTIVE SUMMARY

The regulatory treatment of broadband Internet access may well be the most important single issue facing the Commission today. Numerous regulatory proceedings coalesce around, and depend upon, the outcome of this inquiry. The Commission should take this opportunity to establish a clear and stable regulatory paradigm that will allow for maximum growth of, and maximum competition in, the market for broadband Internet access. Once that paradigm is established, the proper outcome of the various other regulatory proceedings – which for the most part are focused only on ILEC broadband services – will fall naturally into place.

This Commission has long recognized that competitive markets should be governed by market forces, not managed by regulation. Broadband Internet access is a brand new market, already characterized by many competitors, enormous capital investments, and explosive growth. Cable operators are undoubtedly dominant in this market today, but many other providers, using other technologies, are coming-on fast. As the Commission has already concluded, "the preconditions for monopoly appear absent."

Allowing this new market to develop unimpeded, however, requires more than simply establishing a "hands-off" regulatory regime for cable. As the Commission, Congress, and the courts have emphasized time and again, like services must be treated alike, regardless of the name, corporate history, or traditional lines-of-business of the service provider. Broadband Internet access is the same service, whether it is provided over coax, over copper, or through the air. Yet, under the Commission's current regulatory regime, telephone companies that provide this service are regulated to the hilt, while other service providers – the dominant cable operators in particular – are left alone.

The Commission must therefore use this proceeding not just to determine where cable fits on the regulatory map, but to establish a coherent regulatory policy that equalizes treatment for the full range of broadband service providers.

The most logical framework for such a policy is under Title I of the Act. The Commission has already concluded that Internet access – regardless of the transmission medium – is an "information service" subject to regulation under Title I. And as the Commission recognized three decades ago in the fledgling computer industry, regulation under Title I allows the Commission to leave competitive markets to competitive actors.

The Commission has suggested, however, that an information service provider that provides its own transmission facilities might be providing, in addition to an information service under Title I, a "telecommunications service" under Title II. If that is so, the service provider would be subject to regulation as a common carrier. But Commission precedent *requires* this two-hats/two-Titles approach *only* where a provider has market power – that is the only circumstance in which the Commission can justify the imposition of a legal obligation to serve indifferently. Otherwise, the decision is left to the service provider, who may – or may not – decide to provide transmission on a common carrier basis.

Thus, properly joined, the issue here is whether cable has sufficient broadband market power for the Commission to require it to operate as a common carrier. It is a close call, as cable operators serve close to 75 percent of the market, and their upgraded networks are far more ubiquitous than any competing networks. But the better answer – the one that fully accounts for the potential of competitive alternatives – is that cable is not a bottleneck in the market for broadband access. Cable operators should therefore be

given the *option* – as in fact many other service providers have been given the option, in many different contexts – whether to provide a separate broadband transmission path subject to Title II, or whether instead to package their services exclusively under Title I.

If cable operators – the dominant providers of high-speed Internet access – are to be given this option, however, it necessarily follows that incumbent telephone companies – the nondominant latecomers to this market – must be given the same option. To date, the Commission has simply assumed that incumbent LECs that provide high-speed Internet access in competition with cable *must* offer the underlying transmission path on a common carrier basis. That assumption is unfounded. Incumbent LECs should stand on equal footing with other service providers, equally free to package their services under Title I or Title II as they see fit.

Once it is clear that incumbent LECs cannot be compelled to provide broadband on a common carrier basis, it follows that the enormous regulatory scaffold that the Commission has built up around incumbent LEC xDSL offerings must be dismantled. Unbundled access to the high frequency portion of the loop, loop conditioning, loop qualification, related collocation mandates, the restriction on providing in-region interLATA information services, mandatory resale discounts, separate affiliate conditions – all of these requirements (and more) are premised on the counter-factual premise that ILECs control a broadband bottleneck. None can stand once ILECs are no longer required to offer broadband transmission on a common carrier basis.

If the Commission is unwilling to embrace a fully competitive broadband framework, it has available to it an intermediate Title I approach, modeled loosely on the *Computer Inquiries*' comparably efficient interconnection and open network architecture

requirements. Some such requirements – though self-evidently inapplicable where, as here, the telephone network is not a bottleneck – could be resurrected under Title I as a means to facilitate the development of independent ISPs that do not provide their own transmission. If the Commission opts for this intermediate course, however, it must apply it across-the-board. There is no basis for imposing regulation on the nondominant telephone companies that is more intrusive than that felt by the dominant cable operators.

If the Commission is unwilling to regulate *all* broadband Internet service providers under Title I only, the only logical alternative is to regulate all of them, cable included, under Title II. That is to say, if the xDSL-enabled transmission path that underlies the ILECs' broadband Internet service is a "telecommunications service" subject to Title II, then so too is the cable modem platform that underlies cable Internet service. That cable operators currently elect to bundle their information service with the transmission cannot be dispositive – no more (or less) so than such an election is dispositive if made by a telephone company. As the Ninth Circuit recently confirmed, cable operators and telephone companies are equally capable of wearing two regulatory hats simultaneously.

Under a Title II framework, moreover, the Commission must impose on the dominant cable incumbents the same regulatory scaffold that has been imposed on telephone companies, including spectrum unbundling, collocation requirements, performance metrics, and the like. The Commission's Title II authority to do so is indisputable. The Commission has already noted its authority to impose Internet-related interconnection requirements upon all Title II carriers pursuant to sections 201 and 251(a). And Commission precedent establishes that incumbent cable operators – which

must be considered local exchange carriers in the provision of Internet access to the same extent as telephone companies – are comparable to ILECs and therefore directly subject to section 251(c).

As under a Title I framework, there is an intermediate approach under Title II as well. The Commission can declare cable operators as nondominant carriers subject to its permissive detariffing policy, thereby subjecting cable Internet services to reduced common carrier regulation. Of course, if cable broadband providers are classified as nondominant because they do not control bottleneck facilities, ILECs, with perhaps one-quarter of the market, must be nondominant too.

The Commission can also, within a Title II framework, remove many of the current restrictions on ILEC provision of broadband Internet access. It can (and should), for example, de-UNE-fy the high frequency portion of the loop, and in the process eliminate loop conditioning, loop qualification, and related collocation mandates, as well as separate affiliate conditions imposed through the merger process. In that case – but only in that case – such restrictions would not need to be extended to cable modem providers. The key principle driving all such Commission decisions must be regulatory parity in order to preserve the competitive structure of the market.

The final alternative classification for broadband Internet service – as a "cable service" subject to Title VI – is no alternative at all. The statute restricts the term "cable service" to information that a cable operator makes available to all subscribers generally. A substantial portion of Internet content – email and chat rooms, for example – is decidedly *not* available to all subscribers generally, and thus does not meet the statutory definition.

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COMMENTS OF SBC COMMUNICATIONS INC. AND BELLSOUTH CORPORATION

In its *Notice of Inquiry*, the Commission has asked numerous questions about how it should regulate cable Internet service. These questions cannot be answered in isolation. Cable Internet service competes directly with DSL service provided by incumbent LECs and with other nascent broadband services provided by satellite and wireless. Together, these services constitute a single new, highly competitive market that demands uniform regulatory treatment. In this proceeding, the Commission has the opportunity, and the obligation, to develop a new regulatory paradigm that will treat all providers equally and, hence, foster innovation and investment in this rapidly emerging and economically critical market.

Today, cable is indisputably the dominant broadband Internet access provider, with almost three-fourths of the market. Its next closest competitor, DSL, has perhaps one quarter of the market. But the market is young, and growing extraordinarily fast. Huge investments are now being made to upgrade cable plant on the one hand, and telephone plant on the other. Wireless alternatives, both terrestrial and satellite-based,

are emerging rapidly as well. The Commission has correctly concluded that the "preconditions for monopoly appear absent."[1]

By all logic, then, market forces, not regulation, should rule from here on out. So far, the Commission appears to have accepted that conclusion in connection with cable's provision of high-speed services. But the telephone side of this market – the latecomer to the arena, and the nondominant provider – is regulated to the hilt. This upside-down state of regulatory affairs is untenable. It squarely conflicts with decades of Commission precedent establishing that regulation must be tied to the service, not to the underlying technology used to provide it, still less to arbitrary and wholly obsolescent naming conventions, like "cable" and "telephone." And it is tilting investment toward one technology and away from another, something that the Commission itself has frequently insisted it should not be doing. "The role of the Commission is not to pick winners or losers, or select the 'best' technology to meet consumer demand, but rather to ensure that the marketplace is conducive to investment, innovation, and meeting the needs of consumers."[2]

The Commission should thus have the courage to establish a market-based framework for *all* high-speed Internet service providers, and to apply that framework across the board. That means placing all of them – *in their entirety*, including *all* underlying broadband transport components – under Title I of the Communications Act.

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[1] Report, *Inquiry Concerning the Deployment of Advanced Telecommunications Capability*, 14 FCC Rcd 2398, 2423-24, ¶ 48 (1999) ("*First Advanced Services Report*").

[2] *Advanced Services Memorandum Opinion and Order*, 13 FCC Rcd 24011, 24014-15, ¶¶ 2, 3 & n.6 (1998); *see also, e.g.*, First Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499, 15989, ¶ 993 (1996) ("*Local Competition Order*") ("[A]s a general policy matter, . . . all telecommunications carriers that compete with each other should be treated alike regardless of the technology used unless there is a compelling reason to do otherwise.").

It also means rolling back burdensome regulation that has been imposed on incumbent LECs providing DSL; and forestalling premature regulation of the new technologies incumbent LECs are rolling out to serve this evolving market.[3]

The only economically rational and lawful alternative to a Title I framework is to place the underlying broadband transport components *for all services* – both cable and telephone – under Title II of the Communications Act. The Commission would then need to apply the full panoply of unbundling, interconnection, collocation and separate affiliate obligations even-handedly to both. Or, to the extent that the Commission forbears from applying any of those requirements or restrictions on cable modem service, it must remove them from DSL service as well.

The third alternative mentioned by the Commission in its *Notice of Inquiry* – placing all high-speed Internet service under Title VI – is no alternative at all. The statute and its legislative history unambiguously foreclose that result.

BACKGROUND

As the Commission has already correctly concluded, broadband Internet service occupies a separate market.[4] The service is different from both traditional phone and

[3] For this reason, the Commission should avoid any precipitous action in pending proceedings on line sharing, access to remote terminals, and the like, where parties are advocating increased regulation of wireline broadband Internet access services. It is incumbent upon the Commission, first, to establish a coherent, forward-looking regulatory framework that governs all broadband Internet services, rather than to continue to engage in piece-meal regulation of particular technologies.

[4] *E.g.*, FCC Staff Report, *Broadband Today*, at 42 (Oct. 1999) ("*Broadband Today*") (arguing that cable's dominance over broadband will be tempered not by dial-up services but rather by "alternative platforms to use for high-speed data access"); Third Report and Order and Memorandum Opinion and Order, *Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band*, 15 FCC Rcd 11857, 11864-65, ¶ 18 (2000) ("*Fixed Wireless Competition Order*") (discussing competition in the broadband market).

traditional cable video services – it is two-way, high-speed, and digital.[5] Consumers use the new service to do things that they could not do at all over narrowband connections.[6] They pay substantially more for that privilege.[7] The pricing of the new services is not disciplined by the pricing of the old.[8] The technological infrastructure is altogether new as well, and very expensive to boot.[9] Both telephone companies and cable companies must invest comparable amounts to make it possible to provide broadband services – they are, in effect, building new networks in a race to serve these customers.[10]

The battle lines in this new market are clearly drawn. On one side stand the incumbent cable operators, on the other the incumbent telephone companies. Neither is dependent in any way on the other's wires. And both face a threat from new technologies

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[5] *See First Advanced Services Report*, 14 FCC Rcd at 2406, ¶ 20 (defining "broadband" as the capability of supporting in both directions a speed in excess of 200kbps in the last mile); *see also id.* at 2407, ¶ 23 ("[W]hether a capability is broadband does not depend on the use of any particular technology or the nature of the provider.").

[6] *See, e.g., Broadband Today* at 9; *see also United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 404 (1956) (whether two products compete depends on whether their "price, use and qualities" render them interchangeable).

[7] Broadband service typically costs approximately $40 per month. *See, e.g., Fixed Wireless Competition Order*, 15 FCC Rcd at 11865-66, ¶ 20. By contrast, dial-up connections are often free. *See, e.g.*, http://dl.www.juno.com/get/web; http://www.netzero.com/; http://www.altavista.com; http://freeisp.nbci.com/; http://freelane.excite.com/.

[8] *See, e.g.*, Declaration of Jerry A. Hausman ¶ 10, Comments of America Online, Inc., *Joint Applications of AT&T Corp. and Tele-Communications, Inc. for Transfer of Control to AT&T of Licenses and Authorizations Held by TCI and Its Affiliates or Subsidiaries*, CS Docket No. 98-178 (FCC filed Oct. 29, 1998) ("[The] price of narrowband Internet service does not affect the demand for broadband Internet service.").

[9] Cost estimates for establishing high-speed service range from $500 to $1,200 per subscriber. *See* Sanford C. Bernstein & Co. and McKinsey & Co., Inc., *Broadband!*, at 77-78 (Jan. 2000) ("*McKinsey Broadband Report*") (estimating upgrade costs per subscriber at $545 for cable, $908 for DSL and $610 for MMDS); J. Creswell, *The Shaky Assumptions Boosting Cable Prices*, Fortune (July 5, 1999) (noting that cable operators face "upgrades of titanic proportions and huge amounts of capital expenditures," including "high-speed data upgrades" at $700 to $1,200 per customer); *see also Fixed Wireless Competition Order*, 15 FCC Rcd at 11868, ¶ 24 ("LMDS equipment . . . is expensive, and requires large infusions of capital.").

[10] *See, e.g.*, FCC Press Release, *FCC Issues Report on the Availability of High-Speed and Advanced Telecommunications Services* (Aug. 3, 2000) (estimating broadband annual growth rate at between 150 and 350 percent).

– fixed wireless in particular, and satellite – that are already available commercially and that completely bypass the traditional wireline networks.[11]

Cable is unquestionably winning the broadband battle so far. Cable operators got to market first, and they have signed-up close to three out of every four residential broadband subscribers. *See* Attach. A.[12] Together, the two largest cable modem providers – AT&T's Excite@Home and Time Warner's Road Runner – have far more residential subscribers than all DSL providers combined. *See id.* The Commission expects cable companies to reach 61 million households by the end of this year, a better than 60 percent advantage over DSL.[13] Analysts are generally of the view that DSL will not be on a competitive par with cable in this market for four years or more.[14] And the other emerging technologies, though fully expected to compete significantly in this market, have yet to make substantial inroads on cable's dominance. *See* Attach. A.

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[11] *See, e.g., Broadband Today* at 21-22; *Fixed Wireless Competition Order*, 15 FCC Rcd at 11865, ¶ 19 (identifying "a continuing increase in consumer broadband choices within and among the various delivery alternatives – xDSL, cable modems, satellite, fixed wireless, and mobile wireless").

[12] *See also, e.g.*, Second Report, *Inquiry Concerning the Deployment of Advanced Telecommunications Capability*, CC Docket No. 98-146, FCC 00-290, ¶¶ 71, 72 (rel. Aug. 21, 2000) ("*Second Advanced Services Report*") (as of December 31, 1999, cable had 87.5% of all residential "advanced services" subscribers and 78% of all residential "high-speed" subscribers).

[13] *See Broadband Today* at 26; *see also McKinsey Broadband Report* at 30-31 & Exhs. 22, 26 (forecasting that cable will reach 63,680,000 households, and DSL 38,560,000, by year end 2000); *compare* Bear Stearns Equity Research, *Byte Fight!*, at 36 (Apr. 2000) ("*Bear Stearns Report*") (By year-end 2000, all major cable operators "will have at least 70% of their plant at 750 MHz or above," and most will be "largely completed with their upgrades by the middle of 2002") *with Fixed Wireless Competition Order*, 15 FCC Rcd at 11870, ¶ 29 ("Forty to fifty percent of local lines in the National Exchange Carrier Association pools exceed three miles, at or beyond DSL's practical limit of 3.4 miles . . . .").

[14] *See Broadband Today* at 27 & App. B, Chart 2 (predicting that cable will continue to lead DSL until at least 2007); *Bear Stearns Report* at 57, Exh. 15 (predicting 12.7 million cable modem customers in 2004 compared to 9.5 million DSL customers); *McKinsey Broadband Report* at 44, Exh. 20 ("[w]e expect that cable's initial lead and higher installed base combined with its closer and more natural tie to television will likely mean the persistence of the cable market-share lead over DSL into the 2004 time frame").

Despite cable's dominance, the Commission has apparently concluded – reasonably, in our view – that there is enough "actual and potential competition" in the broadband market today to leave its development to market forces.[15] Accordingly, the Commission has signaled its commitment not to take sides in this battle, and to allow market actors to recoup the fruits of their investment. As Chairman Kennard explained:

> "[T]he FCC has taken a hands-off, deregulatory approach to the broadband market. . . . There is no sign that consumers do not have other avenues to get broadband connections if they don't want to use cable. . . . So we decided to let the market forces churn while we carefully monitor the situation, and the marketplace has responded with enormous investment in broadband – and not just in cable."[16]

Despite this clear statement – upon which the industry has relied in making huge investments to upgrade their facilities – the Commission's approach has turned out to be anything but "hands-off" and "deregulatory." Rather than leaving this race to the fit, the Commission has shackled the incumbent telephone companies – the nondominant player, with perhaps a quarter of the market – with burdensome, highly restrictive regulation that is not felt by the dominant cable incumbents.[17] Telephone companies have to "unbundle" the wireline spectrum that they use for broadband, for example, and make it available to all comers at regulated prices. Cable companies do not. Telephone companies must permit their competitors to "collocate" equipment in telephone company premises to

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[15] Memorandum Opinion and Order, *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from MediaOne Group, Inc. to AT&T Corp.*, 15 FCC Rcd 9816, 9862, ¶ 116 (2000) ("*AT&T/MediaOne Order*"); *see also Fixed Wireless Competition Order*, 15 FCC Rcd at 11864, ¶ 18 ("An increasing number of broadband firms and technologies are providing growing competition to incumbent LECs and incumbent cable companies, apparently limiting the threat that they will be able to preclude competition in the provision of broadband services.").

[16] Chairman William E. Kennard, Remarks Before the Federal Communications Bar Northern California Chapter, *The Unregulation of the Internet: Laying a Competitive Course for the Future* (July 20, 1999); *see also First Advanced Services Report*, 14 FCC Rcd at 2402, ¶ 5 (in advanced services, "[w]e intend to rely as much as possible on free markets and private enterprise").

[17] *See generally infra* pp. 19-23, 32-38.

make it easier to use that "unbundled" spectrum. Cable companies do not. Telephone companies are almost completely locked-out of the multi-billion dollar (and rapidly expanding) Internet backbone service. Cable companies are not. Telephone companies must offer their retail broadband transmission services to competitors at a federally mandated discount. Cable companies do not. Telephone companies have to pay-in to universal service when they provide broadband access. Cable companies do not. And telephone companies have been forced to carve-out their broadband transmission services into a separate affiliate as a condition to gaining regulatory approval of recent mergers. Cable companies have not.

As a policy matter, this regulatory disparity is unjustifiable. Each of the regulatory restrictions placed on the telephone companies is grounded in the premise that telephone companies control a bottleneck in the market for broadband access. They do not. If there is any bottleneck control to be considered in this new market, it belongs to the dominant cable operators. Asymmetric treatment is unfair, and it puts at risk the industry's commitment to go forward with the huge capital investments necessary to bring broadband services to the general public.

As a legal matter, the disparity is equally untenable. As we explain in detail below, Commission precedent, congressional directive, and judicial mandate all stand squarely for the proposition that like services must be treated alike. The Commission must therefore establish a regulatory framework that takes account of the full range of broadband service providers, not just cable operators. Because the services in question are competitive, the appropriate treatment is market-based. But if the Commission lacks the inclination to establish such a framework, the inescapable alternative is that

incumbent cable operators must be subject to the same regulatory framework that now burdens the incumbent telephone companies.

DISCUSSION

I. REGULATORY CATEGORIZATIONS MUST TRACK THE NATURE OF THE SERVICE, NOT THE UNDERLYING TECHNOLOGY OR THE HISTORICAL LINES OF BUSINESS OF THE SERVICE PROVIDER.

It is the nature of a service, not the name, history, or character of the entity providing it, that determines which Title of the Communications Act applies. That principle has been consistently affirmed by Congress, the Commission, and the courts, for over four decades.

The Communications Act states unambiguously that Title III broadcasters are not common carriers.[18] Yet a Title III "broadcaster" ceases to "engage in broadcasting" – it becomes a Title II "carrier" instead – when it offers carriage over the "blanking interval" or "subcarrier" portions of its assigned frequency bands, or when it makes comparable use of the digital spectrum allocated to it pursuant to the 1996 Act.[19] Cable systems likewise cannot be regulated under Title II "by reason of providing any *cable* service."[20] But they *do* fall under Title II as soon as they provide a *telecommunications* service.[21]

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[18] *See* 47 U.S.C. § 153(h) ("a person engaged in radio broadcasting shall not . . . be deemed a common carrier").

[19] *See* Report and Order, *Digital Data Transmission Report and Order*, 11 FCC Rcd 7799, 7805, ¶ 16 (1996) ("consistent with the current VBI telecommunications service rules, ancillary services that are common carrier in nature and provided over broadcast signals will be subject to common carrier regulation"); 47 C.F.R. § 73.295(b) ("FM subsidiary communications services that are common carrier in nature are subject to common carrier regulation."); Fifth Report and Order, *Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service*, 12 FCC Rcd 12809, 12820-21, ¶ 29, 12823, ¶ 36 (1997) ("ancillary and supplementary services" provided over digital spectrum allocated pursuant to 47 U.S.C. § 336 will be regulated "in a manner consistent with analogous services provided by other persons or entities").

[20] *See* 47 U.S.C. § 541(c) (emphasis added).

[21] *Id.* § 541(b) (exempting cable systems from cable franchise requirements when providing telecommunications services); *id.* § 541(d)(1) (FCC and states may require cable systems to tariff services

Telephone companies have traditionally provided carriage under Title II, but they are Title VI cable operators insofar as they use their facilities (copper, coax, or any other) to provide a "cable service" instead.[22] The same holds for DBS and MDS licensees: whether their services fall under Title II or Title III depends on the nature of the services, not on the technology used to supply them.[23]

When in the past the Commission has lost sight of this core principle – that the nature of the service defines its regulatory treatment – the courts or Congress have intervened. Reasoning that anything offered by a service provider primarily in the business of common carriage *is* "common carriage," the Commission at one time attempted to regulate a dark fiber service as common carriage, even though the service had been offered only on a private-contract basis. The D.C. Circuit overturned that decision, noting that "[w]hether an entity in a given case is to be considered a common carrier" turns not on its usual status but "on the *particular practice* under surveillance."[24]

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that would be subject to regulation "if offered by a common carrier subject . . . to [Title II]"); *see also* H.R. Rep. No. 98-934, at 43 (1984 Cable Act) ("[The] distinction between cable services and other services offered over cable systems is based upon the nature of the service provided, not upon a technological evaluation of the two-way transmission capabilities of cable systems.").

[22] 47 U.S.C. §§ 522(a)(7), 571(a)(3).

[23] *See* Report and Order, *Inquiry into the Development of Regulatory Policy in Regard to Direct Broadcast Satellites for the Period Following the 1983 Regional Administrative Radio Conference*, 90 F.C.C.2d 676, 706-09, ¶¶ 78-84 (1982) ("*DBS Order*"), *aff'd in relevant part, National Ass'n of Broadcasters v. FCC*, 740 F.2d 1190, 1199-1206 (D.C. Cir. 1984); *see also* Letter from Barbara A. Kreisman, Chief, Video Services Division, Mass Media Bureau, FCC, to Marvin Rosenberg, Esq., Fletcher, Heald & Hildreth (Jan. 15, 1993) ("*Kreisman Letter*") (summarizing DBS regulatory framework); Report and Order, *Revisions to Part 21 of the Commission's Rules Regarding Multipoint Distribution Service*, 2 FCC Rcd 4251, 4251-53, ¶¶ 1-16 (1987) ("*MDS Report and Order*) (authorizing MDS operators to choose common carrier or non-common carrier status for individual channels); *National Ass'n for Better Broad. v. FCC*, 849 F.2d 655 (D.C. Cir. 1988) (upholding FCC exemption of DBS from Title III obligations through analogy to MDS regulation); *see also* Report and Order, *Subscription Video*, 2 FCC Rcd 1001, 1005, ¶ 32 (1987) (differentiating broadcast from subscription-based service).

[24] *Southwestern Bell Tel. Co. v. FCC*, 19 F.3d 1475, 1481 (D.C. Cir. 1994) (emphasis added); *see also National Ass'n of Regulatory Util. Comm'rs v. FCC*, 525 F.2d 630, 644 (D.C. Cir. 1976) (*NARUC I*) ("[a] particular system is a common carrier by virtue of its functions"); *National Ass'n of Regulatory Util. Comm'rs v. FCC*, 533 F.2d 601, 608 (D.C. Cir. 1976) (*NARUC II*) ("Since it is clearly possible for a given

When the Commission declined to place NEXTEL's "private" wireless service on the same regulatory footing as functionally equivalent "public" service, Congress enacted legislation to ensure that "services that provide equivalent mobile services are regulated in the same manner."[25] And when the Commission still sought to regulate PCS differently from cellular, the Sixth Circuit overruled it.[26]

As the Commission itself has repeatedly declared, the 1996 Act is "technologically neutral and is designed to ensure competition in all telecommunications markets."[27] By eliminating regulatory distinctions between incumbent LECs, cable operators, and others, the 1996 Act allows these providers not only to challenge one another in their traditional strongholds, but also to compete on equal terms in the creation and development of new markets, whatever technology they might use.[28]

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entity to carry on many types of activities, it is at least logical to conclude that one can be a common carrier with regard to some activities but not others.").

[25] H.R. Rep. No. 103-111, at 259-60 (1993) (discussing Pub. L. No. 103-66, tit. VI, § 6001(a), 107 Stat. 312 (1993)); *see also id.* (though "'private' carriers have become indistinguishable from common carriers," they were "subject to [an] inconsistent regulatory scheme[]"; because the "disparities in the current regulatory scheme could impede the continued growth and development of commercial mobile services," the Commission was directed to "achieve regulatory parity among services that are substantially similar") (footnote omitted).

[26] *See Cincinnati Bell Tel. Co. v. FCC*, 69 F.3d 752, 768 (6th Cir. 1995) ("If [PCS] and Cellular . . . are expected to compete for customers on price, quality, and services, . . . what difference between the two services justifies keeping the structural separation rule intact for Bell Cellular providers? The FCC provides no answer to this question, other than its raw assertion that the two industries are different."); *see also GTE Midwest, Inc. v. FCC*, No. 98-3167, 2000 WL 1701414, at *1-*2 (6th Cir. Nov. 15, 2000) (affirming Commission decision on remand from *Cincinnati Bell* to impose separate affiliate requirements on *all* local telephone companies providing *any* kind of commercial mobile radio service).

[27] *See* Order on Remand, *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 15 FCC Rcd 385, 386, ¶ 2 (1999) ("*Advanced Services Order on Remand*"); *Advanced Services Memorandum Opinion and Order*, 13 FCC Rcd at 24017, ¶ 11; *see also* Report to Congress, *Federal-State Joint Board on Universal Service*, 13 FCC Rcd 11501, 11548, ¶ 98 (1998) ("*Report to Congress*") ("We are mindful that, in order to promote equity and efficiency, we should avoid creating regulatory distinctions based purely on technology."); *see generally* B. Esbin, Office of Plans and Policy, FCC, *Internet Over Cable: Defining the Future in Terms of the Past*, at 96 (OPP Working Paper No. 30, Aug. 1998) (noting the "fundamental communications policy goal[]" of "competitive and technological neutrality").

[28] *See, e.g.*, Sixth Annual Report, *Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, 15 FCC Rcd 978, 982, ¶ 10 (2000) ("*Sixth Video Competition Report*") (the 1996 Act "removed barriers to LEC entry into the video marketplace in order to facilitate competition

The Commission itself, however, has wholly failed to respect that principle in connection with broadband Internet services. The Commission has justified its departure on the ground that the 1996 Act "explicitly makes distinctions based on a common carrier's prior monopoly status."[29] But the incumbent phone companies that are directly burdened by that conclusion have no "prior monopoly" in the market for broadband Internet services – there is no "prior" market here at all; the market is brand new.

Equally important, this new market is not dependent on any one technology or set of facilities under the control of the incumbent phone companies. In that respect, the market is fundamentally different from prior new markets, such as information services and even cellular, which remained heavily dependent upon the public switched telephone network. As those markets emerged, the Commission sought simultaneously to deregulate new entrants, while retaining restrictions on the participation of local telephone companies to prevent any abuse of bottleneck control over local exchange facilities. For broadband Internet services, there is no bottleneck. Coax, not copper, is the dominant technology. And wireless and satellite alternatives are developing fast. Many billions of dollars are now being invested in an array of facilities used to provide these services. To microscopically regulate one portion of that investment, but not the others, cannot be reconciled with the language or intent of the 1996 Act. Still less can it be justified as rational economic policy.

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between incumbent cable operators and telephone companies"); *Fixed Wireless Competition Order*, 15 FCC Rcd at 11861, ¶ 8 (noting "the 1996 Act's mandate to stimulate competition in telecommunications markets with a minimum of regulatory interference").

[29] Third Report and Order and Fourth Report and Order, *Deployment of Wireline Services Offering Advanced Telecommunications Capability* and *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 14 FCC Rcd 20912, 20941, ¶ 59 (1999) ("*Line Sharing Order*").

If there is any "prior monopoly" to consider here at all, it is the cable operators' – they are the ones who began with a dominant position in the antecedent "broadband" market, the market for multi-channel video distribution.[30] The better view, however – indeed, the only view consistent with sound policy and the 1996 Act – is that broadband Internet service constitutes brand new territory to which every provider should be able to stake a claim using its own blend of technology, without any prior regulatory baggage based on the services that it has historically provided in a wholly different market.

II. THREE REGULATORY MODELS FOR BROADBAND.

All providers of high-speed Internet services should be regulated under Title I – and under Title I alone. To get to that point, the FCC must dismantle the sprawling scaffold of regulation that it has erected around ILEC DSL services.

The only principled alternative – the only alternative that is defensible on economic grounds, and that will survive review in the courts – is to treat the underlying broadband data transmission as a Title II service, and to subject all such providers to identical Title II regulation (either the full panoply of regulations currently applicable to the DSL offerings of incumbent telephone companies, or a significantly reduced set of regulations appropriate to nondominant carriers in a competitive market).

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[30] *See* 47 U.S.C. § 522(13) ("the term 'multichannel video programming distributor' means a person such as, but not limited to, a cable operator, a multichannel multipoint distribution service, a direct broadcast satellite service, or a television receive-only satellite program distributor, who makes available for purchase . . . multiple channels of video programming"); *Sixth Video Competition Report*, 15 FCC Rcd at 981, ¶ 5 ("as of June 1999, 82% of all MVPD subscribers received their video programming from a local franchised cable operator"); *id.* at 982, ¶ 11 ("Cable operators continue to expand their broadband infrastructure that permits them to offer high-speed Internet access.").

A third regulatory option suggested by the Commission – classifying *all* high-speed Internet services as Title VI "cable services" – is no option at all. The statute and its legislative history unambiguously foreclose that result.

A. TITLE I SHOULD GOVERN HIGH-SPEED INTERNET SERVICES.

Where, as here, a market is competitive, "[t]he Commission's charge is to . . . *avoid* direct intervention."[31] Regulation impedes competition and slows growth and innovation.[32] It is especially important to allow market forces, rather than regulatory fiat, to determine how best to allocate resources in nascent markets, where competitors are making large investments and deploying innovative technologies to meet new demand.[33]

Three decades ago, the Commission affirmed precisely that principle when it set about removing "computers" from the ambit of Title II regulation.[34] It should do the same for broadband. But, in this context, the Commission needs to go even farther than it did in the *Computer Inquiries*. There, because nascent computer-based information

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[31] *Broadband Today* at 45 (emphasis added); *see also Fixed Wireless Competition Order*, 15 FCC Rcd at 11861, ¶ 8 (regulatory restriction on fixed wireless is warranted only "when there is a significant likelihood of substantial harm to competition in specific markets and when the restriction will be effective in eliminating that harm").

[32] *See, e.g.*, *Second Advanced Services Report* ¶ 246 ("competition, not regulation, holds the key to stimulating further deployment of advanced telecommunications capability"); Report, *In the Matter of Section 257 Report to Congress; Identifying and Eliminating Market Entry Barriers For Entrepreneurs and Other Small Businesses*, FCC 00-279, ¶ 20 (rel. August 10, 2000) ("economically unjustified intervention might make it difficult to promote vigorous competition").

[33] *See, e.g.*, Memorandum Opinion, Order and Authorization, *Domestic Fixed-Satellite Transponder Sales*, 90 F.C.C.2d 1238, 1252, ¶ 34 (1982).

[34] *See* Final Decision, *Regulatory and Policy Problems Presented by the Interdependence of Computer and Communications Services and Facilities*, 28 F.C.C.2d 267 (1973), *aff'd in part sub nom. GTE Serv. Corp. v. FCC*, 474 F.2d 724 (2d Cir. 1973); *see generally* J. Oxman, Office of Plans and Policy, FCC, *The FCC and the Unregulation of the Internet*, at 6 (OPP Working Paper No. 31, July 1999) ("The FCC has taken numerous steps since the early days of the telecommunications data services industry three decades ago to permit competitive forces, not government regulation, to drive the success of that industry. . . . [T]he success of the Internet today, is, in part, a direct result of those policies.").

services were heavily dependent upon the public switched telephone network, the Commission imposed, first, a policy of strict separation, and later an array of unbundling and non-discrimination requirements upon the incumbent telephone companies insofar as they wanted to provide information services.[35] But broadband Internet services are not dependent upon the local telephone network. To the contrary, cable is currently the dominant medium, and wireless and satellite technologies are also developing fast. Under these circumstances, telephone companies, cable companies, wireless and satellite providers – all participants should be free to compete in an open market without any restrictions based on the other services they might provide. Those other services provide no special advantages in the provision of high-speed Internet services and hence should carry no special regulatory disabilities.

1. A Market-Based Title I Framework.

Broadband Internet service – the bundled package of transport and content – is an "information service," subject to Title I. The 1996 Act defines an "information service" as "a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications."[36] Internet service does precisely that.[37]

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[35] *See* Final Decision, *Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, 77 F.C.C.2d 384 (1980) ("*Computer II Final Decision*") (requiring structurally separate affiliate for incumbent telephone company provision of enhanced services); Report and Order, *Amendment of Section 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry)*, 104 F.C.C.2d 958 (1986) ("*Computer III*") (imposing comparably efficient interconnection and open network architecture requirements in lieu of structural separation); *see also* Report and Order, *Policy and Rules Concerning the Furnishing of Customer Premises Equipment, Enhanced Services and Cellular Communications Services by the Bell Operating Companies*, 95 F.C.C.2d 1117 (1983) ("*BOC Separation Order*") (extending *Computer Inquiries* framework to Bell operating companies created pursuant to MFJ).

[36] 47 U.S.C. § 153(20).

[37] *See, e.g.*, *Report to Congress*, 13 FCC Rcd at 11529-30, ¶¶ 58-59 (concluding that Internet access is an "information service"); *Advanced Services Order on Remand*, 15 FCC Rcd at 401, ¶ 34 (same); First

Less clear is how to treat broadband Internet service providers who self-provide their own high-speed transport. The Commission has suggested that it might be possible to treat such providers as providing *both* a Title I information service *and* a Title II telecommunications service.[38] If so, then cable Internet service providers – the dominant providers (as self-providers) of high-speed transmission – are common carriers, fully subject to Title II.[39] We explore the implications of that conclusion in Part II(B) below.

But there is a better way – better as a matter of policy and more in keeping with the language and intent of the 1996 Act. As long as it treats all self-providers of broadband transport the same way, the Commission is not required to adopt a two-hats/two-Titles approach. To the contrary, the Commission's *NARUC I* precedent requires that approach only if cable operators "ha[ve] sufficient market power" over the market for the underlying transport service "to warrant regulatory treatment as a common carrier"; that is the only circumstance in which "the public interest [would] *require*[] common carrier operation" of the facilities at issue.[40] Otherwise, the Commission is free

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Report and Order and Further Notice of Proposed Rulemaking, *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as Amended*, 11 FCC Rcd 21905, 21967-68, ¶ 127 (1996) ("*Non-Accounting Safeguards Order*") (same).

[38] *Report to Congress*, 13 FCC Rcd at 11530, ¶¶ 59-60 ("Since *Computer II*, we have made it clear that offerings by non-facilities-based providers combining communications and computing components should always be deemed enhanced. But the matter is more complicated when it comes to offerings by facilities-based providers."); *id.* at 11530, ¶ 69 (in cases where an ISP owns transmission facilities, "[o]ne could argue that [the ISP] is furnishing raw transmission capacity to itself.").

[39] *See, e.g.*, Memorandum Opinion and Order, *AT&T Submarine Systems, Inc.*, 13 FCC Rcd 21585, 21587-88, ¶ 6 (1998) (a "telecommunications service" is a transmission service provided on a common carrier basis, so "'telecommunications carrier' means essentially the same as common carrier").

[40] *Id.* at 21589, ¶ 9; Memorandum Opinion, Declaratory Ruling, and Order, *Cox Cable Communications, Inc., Commline, Inc. and Cox DTS*, 102 F.C.C.2d 110, 120-22, ¶¶ 22-28 (1985); *see also NARUC I*, 525 F.2d at 644 n.76 (noting that Commission may "impos[e] [upon a carrier] requirements which . . . ma[ke] them common carriers"); *see generally* M. Kende, Office of Plans and Policy, FCC, *The Digital Handshake: Connecting Internet Backbone*, at 9 (OPP Working Paper No. 32, Sept. 2000) (common carrier regulation "serve[s] to protect against anti-competitive behavior by telecommunications providers with market power. In markets where competition can act in place of regulation as the means to protect

to leave it to the provider to choose whether to offer unadorned common carriage to the general public, or instead, to offer a Title I information-service bundle of content and transmission, or instead, a contract-only (and again, Title I) service to selected customers. Common carriage rules kick-in only if the provider itself *elects* to "make capacity available to the public indifferently."[41]

The relevant question, then, is whether cable operators have "sufficient market power" over the market for broadband access "to warrant regulatory treatment as a common carrier." It is a close call, and one that depends largely on whether DSL – cable's principal competitor – is or is not truly free to compete against it. As noted, cable certainly has a dominant share of the market today. The Commission's own prior reliance on significant "potential" competition in the market to discipline cable implicitly – though counterfactually – assumes that DSL is free to compete against cable, on equal terms.[42] Only one thing is clear: The Commission cannot reach any principled conclusion about the state of competition in this market, or the actual or potential competition that cable faces, without fully and simultaneously addressing the status of cable's main competitor. And that depends, in turn, on how the regulatory burdens placed on that competitor compare with those placed on cable itself.

If the Commission sets in place a deregulatory regime that permits true, head-to-head competition between cable and telephone providers of high-speed Internet service, it

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consumers from the exercise of market power, the Commission has long chosen to abstain from imposing regulation.").

[41] *See, e.g., Cable & Wireless PLC*, 12 FCC Rcd 8516, 8522 ¶¶ 14-15 (1997); *Cox Cable*, 102 F.C.C.2d at 121, ¶ 25.

[42] *E.g., AT&T/MediaOne Order*, 15 FCC Rcd at 9866-68, ¶¶ 116-117; Memorandum Opinion and Order, *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Tele-Communications, Inc. to AT&T Corp.*, 14 FCC Rcd 3160, 3206, ¶ 94 (1999) ("*AT&T/TCI Order*").

may then leave it to the competitors themselves to decide how to package their service and, thus, where precisely to locate themselves on the regulatory map. As the Commission has previously noted, market forces alone might ultimately compel cable operators to offer unadorned carrier services to all comers[43] – which would then place those services under Title II. The Commission has given other operators – including DBS licensees,[44] MDS operators,[45] and satellite carriers[46] – similar freedom to position their services under one of the several different regulatory models defined in the Communications Act, and incumbent LECs already have that freedom for video.[47] In those instances, rapid technological advances, the absence of a bottleneck, and the advent of new services supported a market-driven, deregulatory approach, one that would "encourag[e] additional entry, additional facility investment, [and] more efficient use" of resources, while "allow[ing] for technical and marketing innovation in the provision of . . . services."[48] And the market upshot has been a healthy mix of common carrier and non-common carrier services.

Conditions in the fast-evolving market for broadband Internet services warrant the same "hands-off" approach here. But that is so if – and only if – there is indeed a *single*

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[43] *Broadband Today* at 42.

[44] *DBS Order*, 90 F.C.C.2d at 706-09, ¶¶ 78-84.

[45] *MDS Report and Order*, 2 FCC Rcd at 4251-53, ¶¶ 1-16.

[46] *Domestic Fixed-Satellite Transponder Sales*, 90 F.C.C.2d at 1261, ¶ 56.

[47] *See* 47 U.S.C. § 571(a)(2) ("To the extent that a common carrier is providing transmission of video programming on a common carrier basis, such carrier shall be subject to the requirements of [Title II]"); *id.* § 571(a)(3) ("To the extent that a common carrier is providing video programming . . . in any manner other than that described in paragraphs (1) and (2), . . . such carrier shall be subject to the requirements of [Title VI], unless such programming is provided by means of an open video system . . . under section 573 . . . .").

[48] *Domestic Fixed-Satellite Transponder Sales*, 90 F.C.C.2d at 1255, ¶ 41; *see also Wold Communications, Inc. v. FCC*, 735 F.2d 1465, 1468 (D.C. Cir. 1984) ("[r]apid technological advances, demand shifts, and changes in entrepreneurial judgments" caution against "an inflexible regulatory regime").

market for broadband Internet services, in which copper truly can and does compete on equal terms with coax and other technologies, subject to uniform, even-handed, technology-neutral rules.

2. DSL Services Must Likewise Be Regulated Under Title I.

It would be arbitrary and irrational for the Commission to conclude that cable faces significant actual and potential competition, while simultaneously concluding that the broadband service provided by cable's main (though still quite distant) competitor must remain tied up in regulatory knots. That conclusion would also be squarely contrary to Commission precedent. The *NARUC I* analysis looks to *all* competitors in a *single* market. Whatever the underlying economic realities, disparate regulation can make otherwise competitive services non-competitive.

As ILECs have rolled out high-speed Internet services, the Commission has simply assumed, without ever scrutinizing the issue in any depth, that the underlying broadband transmission path *must* be offered on a common carrier basis – if (but only if) it is supplied by telephone companies.[49] That assumption is unfounded; it is also irreconcilable with the application of a different rule to the cable industry. Incumbent LECs are later entrants to the market in question here, with the smaller market share. If cable operators are to be given the *option* of whether or not to offer high-speed Internet access service on a common-carrier basis, phone companies must be given that option

[49] *See, e.g., Advanced Services Memorandum Opinion and Order*, 13 FCC Rcd at 24030-31, ¶ 37 ("We note that BOCs offering information services to end users of their advanced service offerings, such as xDSL, are under a continuing obligation to offer competing ISPs nondiscriminatory access to the telecommunications services utilized by the BOC information services."); *see also GTE Telephone Operating Cos., GTOC Tariff No. 1*, 13 FCC Rcd 22466, 22474-83, ¶¶ 16-32 (1998) ("*GTE ADSL Tariff Order*") (assuming that ADSL is a common carrier service subject to tariff, and examining its jurisdictional nature to determine whether it should be tariffed at the federal level).

too.[50] Otherwise, the industries cannot rationally be viewed as competing in the same market.

The Commission certainly has the authority to give phone companies that option.[51] If cable, the dominant provider of broadband transport, is to be deregulated on the ground that it faces lots of actual or potential competition, then telephone, the nondominant competitor, cannot simultaneously remain regulated on the ground that it possesses, in the same market, an exclusive bottleneck.[52]

The Commission should therefore repudiate all requirements that incumbent LECs provide the xDSL-based transmission path as a common carrier service. Only if an ILEC *elected* to provide broadband data transmission as a common carrier service would it be subject to Title II regulation (and only minimal such regulation, pursuant to the ILEC's nondominant status, *see infra* pp. 38-42). Where an ILEC instead opts to provide only a bundled high-speed Internet service, the service should be a Title I "information service" – exactly like the indistinguishable, bundled, high-speed Internet service offered by the cable company against which the ILEC's service can and should directly compete.

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[50] The fact that the Commission requires ILECs to file tariffs for their DSL offerings, *see GTE ADSL Tariff Order*, 13 FCC Rcd at 22466, ¶ 1, should not preclude ILECs from having the same election as cable operators. The Commission has ample authority to relieve these tariffing obligations. *See infra* n.51.

[51] *See* Cable Landing License, *AT&T Submarine Systems, Inc.*, 11 FCC Rcd 14885, 14886, ¶ 2 (1996) (the Commission may "change the regulatory status" of a common carrier service based on market conditions.); *see also Computer and Communications Indus. Ass'n v. FCC*, 693 F.2d 198 (D.C. Cir. 1982) (upholding *Computer II* decision to detariff service elements that had been treated as common carrier offerings; further investigation had revealed them not to be common carriage communications offerings within the meaning of the Act); *Wold Communications*, 735 F.2d at 1468 (upholding FCC decision to allow the outright sale of satellite transponders that had been used to provide common carriage; FCC made a "modest adjustment" to changed market circumstances).

[52] *See ALLTEL Corp. v. FCC*, 838 F.2d 551, 561 (D.C. Cir. 1988) ("[A] regulation perfectly reasonable and appropriate in the face of a given problem may be highly capricious if that problem does not exist.") (internal quotation marks omitted); *see also Computer II Final Decision*, 77 F.C.C.2d at 434, ¶ 129 (Commission's "rulemaking power is expressly confined to promulgation of regulations that serve the public interest," and a regulation "depending for its validity upon a premise extant at the time of enactment may become invalid if subsequently that predicate disappears.") (internal quotation marks omitted).

The Commission must likewise repudiate the rules it recently promulgated that require ILECs to provide unbundled access to spectrum – *i.e.*, to the high frequency portion of the copper loop.[53] Section 251(c)(3) requires unbundling of "network elements," which the statute defines as "facilit[ies] or equipment used in the provision of a telecommunications service."[54] If an ILEC does not opt to offer its xDSL-enabled transmission path as a "telecommunications service" at all, that portion of the loop cannot be treated as a "network element." The Commission would remain free, of course, to continue requiring the unbundling of the *narrow*band portion of the loop – *i.e.*, "the transmission frequencies . . . used for analog voice service on any lines that LECs use to provide exchange service."[55]

And the Commission is required, moreover, to de-UNE-fy elements insofar as competition would not be "impaired" by their disappearance. *See* 47 U.S.C. § 251(d)(2); *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 389 (1999). Cable – the dominant competitor in this market – plainly does not rely on ILEC copper to compete, nor does fixed wireless or satellite. If robust competition in the market does not require the unbundling of *cable's* dominant spectrum, it surely cannot require the unbundling of the *ILEC's* nondominant spectrum.

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[53] *See Line Sharing Order*, 14 FCC Rcd at 20921, ¶ 13.

[54] 47 U.S.C. § 153(29); *see also Local Competition Order*, 11 FCC Rcd at 15632-33, ¶ 261 (noting that the statute confines the term "network elements" to facilities used by the ILEC in the provision of a telecommunications service).

[55] First Report and Order and Further Notice of Proposed Rulemaking, *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 14 FCC Rcd 4761, 4808, ¶ 99 (1999) ("*Collocation Order*"). Although a proper application of sections 251(c)(3) and (d)(2) would result in unbundling only the narrowband frequency of the loop, it may be the case that, as a matter of pure administrative convenience, a CLEC that took an entire loop would be entitled to use the high frequency portion along with the voice channel. *See, e.g., Cellnet Communications, Inc. v. FCC*, 149 F.3d 429, 439 (6th Cir. 1998) ("The consideration of administration costs is a natural component to the consideration of competition and the effect of the proposed rule on the relevant markets.").

All ancillary "spectrum unbundling" regulations must go, too. Loop qualification mandates, for example.[56] Loop conditioning mandates as well.[57] The DSL-related performance reporting and penalty plan requirements the Commission has imposed as conditions to section 271 and merger approvals.[58] If robust competition in the market does not require imposing any comparable requirements on cable's *dominant* spectrum, it surely cannot require maintaining such requirements on the ILEC's *nondominant* spectrum.

Collocation regulations must be scaled back as well – rather than expanded, as some have proposed in the Commission's pending collocation docket. These commenters claim that collocation of advanced services equipment is necessary to permit access and interconnection to the high frequency portion of the loop.[59] But if robust competition in the market does not require the imposition of such collocation or

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[56] *See, e.g.*, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 15 FCC Rcd 3696, 3885, ¶ 427 (1999) ("*UNE Remand Order*") (ILEC must provide requesting carriers "with nondiscriminatory access to the same detailed information about the loop that is available to the incumbent").

[57] *See id.* at 3783-84, ¶¶ 190-191 (ILECs must condition loops before delivery to ensure that requesting carriers are able to provision advanced services over existing copper loops, even if the ILEC itself is not offering xDSL to the end-user customer on that loop and would not otherwise condition the loop).

[58] Memorandum Opinion and Order, *Applications of Ameritech Corp., Transferor, and SBC Communications Inc., Transferee, For Consent to Transfer Control*, 14 FCC Rcd 14712, 14867-70, 15047-48, ¶¶ 377-383 & Att. A-1a (1999) ("*SBC/Ameritech Order*"); Memorandum Opinion and Order, *Applications of GTE Corp., Transferor, and Bell Atlantic Corp., Transferee, For Consent to Transfer Control*, CC Docket No. 98-184, FCC 00-221, ¶¶ 279-284 & Att. A-1a (rel. June 16, 2000) ("*Bell Atlantic/GTE Order*"); Memorandum Opinion and Order, *Application by SBC Communications Inc., et al., Pursuant to Section 271 of the Telecommunications Act of 1996 To Provide In-Region, InterLATA Services In Texas*, CC Docket No. 00-65, FCC 00-238, ¶ 425 (rel. June 30, 2000); Memorandum Opinion and Order, *Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act To Provide In-Region, InterLATA Service in the State of New York*, 15 FCC Rcd 3953, 4170, ¶ 439 (1999) ("*New York Order*").

[59] *See, e.g.*, Reply Comments of Network Access Solutions at 4, CC Docket Nos. 98-147 & 96-98 (FCC filed Nov. 14, 2000); Reply Comments of Sprint Corp. at 3, CC Docket Nos. 98-147 & 96-98 (FCC filed Nov. 14, 2000); Reply Comments of Advanced Telecom Group, Inc. at 11, CC Docket Nos. 98-147 & 96-98 (FCC filed Nov. 14, 2000).

interconnection obligations on *cable*, the dominant providers of high-speed Internet services, it surely cannot require their imposition on ILECs, the nondominant competitors.

InterLATA restrictions must also be eliminated, insofar as they have been (unlawfully) extended to Internet services.[60] Section 271 applies to BOC *provision* of "interLATA services," 47 U.S.C. § 271(a), which are defined in turn as "telecommunications" between LATAs, 47 U.S.C. § 153(21). As the Commission has held, an information service provider that transmits information across LATA boundaries "does not [thereby] *provide* telecommunications"; rather, "it is *using* telecommunications" to provide its information service.[61] InterLATA information services therefore do not fall within "interLATA services" in section 271(a). The Commission has yet to provide a reasoned basis for its decision to the contrary, and cannot in any event reconcile any such ruling with the plain language of the 1996 Act.[62]

ILECs must likewise be freed of any obligation to permit the discounted resale of their high-speed Internet services. Section 251(c)(4) applies by its terms to "telecommunications services." Incumbents that choose not to make the xDSL-enabled transmission path available as a "telecommunications service" would obviously not have to provide that service to resellers at a mandatory discount.

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[60] *See Non-Accounting Safeguards*, 11 FCC Rcd at 21932-33, ¶ 56.

[61] *Report to Congress*, 13 FCC Rcd at 11521, ¶ 41 (emphases added).

[62] The Commission recently indicated that it may reconsider this decision pursuant to a remand from the D.C. Circuit. Public Notice, *Comments Requested in Connection with Court Remand of Non-Accounting Safeguards Order*, CC Docket No. 96-149, DA 00-2530 (rel. Nov. 8, 2000).